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JOHN F. DAVIS, CLE[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1968

UNITED STATES OF AMERICA,
Petitioner,

vs.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $2,674.00,

and

DONALD J. ANGELINI,
Claimant-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE CLAIMANT-RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 477

UNITED STATES OF AMERICA,

Petitioner,

vs.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674.00,

and

DONALD J. ANGELINI,

Claimant-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE CLAIMANT-RESPONDENT

I.

STATEMENT OF THE CASE.

The government's analysis of the "bulk of the testimony on trial" is oversimplified. It is set forth in more precise fashion in the June 29, 1967, decision in this cause

by the United States Court of Appeals for the Seventh Circuit (A. 13-14), which decision was later vacated. (A. 19) In regard to the government's footnote No. 1 (P. 4, its brief) it should be noted that on Petition for Certiorari relating to Mr. Angelini's conviction in 1964, he urged the unconstitutionality of 26 U.S.C. §4411 and 4412 (*Angelini* v. *United States*, No. 377, October Term, 1965), as he had on appeal to the Seventh Circuit (346 F. 2d 278).

SUMMARY OF ARGUMENT

The underlying rationale of the privilege against self-incrimination, as recognized in this court's decisions in *Marchetti* v. *United States*, 390 U.S. 39 and in *Grosso* v. *United States*, 390 U.S. 62, precludes the forfeiture of property used or intended to be used in violation of 26 U.S.C. 4411, 4412, and 4901.

The relationship of the personal privilege against self-incrimination to proceedings to forfeit property is an intimate one, recognized by this court and by the Congress of the United States.

In forfeitures of property not contraband per se, the intent of the possessor is decisive. And the very provisions of Title 26, U.S.C., 7302, articulate the importance of that intent. Illegal intent by the possessor is necessary to validate the forfeiture. The only illegal act or intent of the possessor here is a failure to register and pay the tax imposed by Title 26, U.S.C., Section 4411 and 4412. This court in *Marchetti - Grosso* found the requirements of those sections, as they are enforced by the Internal Revenue Service, clearly incriminatory under both state and federal law and, therefore, in the present posture of those statutes, constitutionally unenforceable.

The only intent that can be assigned to the possessor of the property here was an election not to waive rights

and privileges secured under the Fifth Amendment to the Constitution of the United States. The illegal intent necessary to the proof of the forfeiture of this property cannot be found in the refusal or omission to waive constitutional safeguards.

II.

Complete or limited retroactivity constitutes the rule governing the implementation of the decisions of this court. Complete prospective application of its decision, as urged by the government here, can result only from overwhelming countervailing consideration. The government presents false considerations in urging this court to adopt complete prospective application. The government's "reliance" in forfeitures on the doctrines of *Kahriger* and *Lewis* is not "plain" as the government suggests; reliance was entirely on the statutes (Title 26, U.S.C., §4411 and §4412), as it was with forfeitures before those cases. The urging of a burden on the administration of justice, bottomed only on the argument that spurious, unsuccessful suits will be brought by persons with small, if any, chance of prevailing, is unimpressive to the point of unrealism. Further, it is not this Court's wont to anticipate circumstances (here the threat of a deluge of ill-fated actions) that most probably will never arise. It will settle problems and questions in the administration of justice only when they become — if ever they do — troublesome.

ARGUMENT

1. *The underlying rationale of the privilege against self-incrimination, as recognized in this Court's decisions in Marchetti and Grosso precludes the forfeiture of property used or intended to be used in violation of Title 26 U.S.C. §4411, §4412, and §4901.*

a. The forfeiture laws respecting property not contraband per se are punitive, and addressed to the individual.

The government's whole argument is a divorcement of the property from the owner and possessor, and an insistence that the forfeiture remedies a wrong.

The impersonal nature of the proceeding as urged by the government finds its core at p. 24 of its Brief, where it says:

> "Since forfeiture proceedings are *in rem* in nature, they have only a peripheral relationship to the privilege against self-incrimination, which is uniquely and inherently personal in character."

This court long ago recognized the "relationship of the personal privilege against self-incrimination to proceedings to forfeit property", and found it intimate and not "peripheral".

> "In *U. S.* v. *Mason*, Judge Blodgett took the distinction that in proceedings *in rem* for a forfeiture, the parties are not required by a proceeding under the Act of 1874 to testify or furnish evidence against themselves, because the suit is not against them but against the property. *But where the owner of the property*

has been admitted as a claimant, we cannot see the force of this distinction; nor can we assent to the proposition that the proceeding is not, in effect, a proceeding against the owner of the property, as well as against the goods; *for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited;* and to require such an owner to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property is surely compelling him to furnish evidence against himself. In the words of a great judge: 'Goods, as goods, cannot offend, forfeit, unlade, pay duties or the like, but men whose goods they are.' *

* * *

"But, as before said, although the owner of goods, sought to be forfeited by a proceeding *in rem*, is not the nominal party, he is nevertheless the substantial party to the suit; he certainly is so, after making claim and defense; and in a case like the present he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense." *Boyd* v. *United States*, 116 U.S. 616, 637-638. (Our Emphasis)

That statement by this Court should suffice to overcome the neuter argument of the government, and on the sole basis of the law as set forth in *Boyd*, the decision of the Seventh Circuit herein should be affirmed. However, the government seems to be urging this court to overrule *Boyd*, even though it has been reaffirmed time and again by this Court. Moreover, the history of legislation dealing with the Fifth Amendment and the application of the privilege of the possessor to forfeiture proceedings is firmly established.

By broadest implication this Court has urged, for effective enforcement of its excise and occupational taxes relating to wagering, that the Congress immunize the registrant

and taxpayer against incrimination. Assuming the Congress found it feasible to immunize, it is not conceivable that the cloak of immunity would not also run to forfeitures, a clear indication that the Congress considers the breadth of the Fifth Amendment to extend to this type of proceeding. The scope of the immunity to be given informer statutes beginning in 1890 up until July of last year clearly demonstrates the understanding of the lawmakers.

We have set forth hereinbelow the breadth of the immunity granted by the Congress under sixteen (16) statutes. This is not truly representative of the number of proceedings to which the immunity relates, because of inclusion of the provisions by reference in other statutes:

". . . but no individual shall be prosecuted or subjected to any penalty or *forfeiture* for or on account of any transaction, matter, or thing concerning which he is compelled, after claiming his privilege against self-incrimination, to testify or produce evidence, . . ." (Title 47 U.S.C. §409, originally enacted June 19, 1934); also see Title 16 U.S.C. §825f(g), June 20, 1920; Title 12, U.S.C.§1820(d), September 21, 1950; Title 50, App. §1152(4) originally enacted June 28, 1940; Title 15 U.S.C., §78u(d), originally enacted June 6, 1934; Title 15, U.S.C. §80a-41(d) originally enacted Aug. 22, 1940; Title 15 U.S.C. §80b-9(d), originally enacted August 22, 1940.

"No person shall be prosecuted or be subjected to any penalty or *forfeiture* . . ." etc. (Title 15, U.S.C. §32, Feb. 25, 1903); "But no person shall be prosecuted or subjected to any penalty or *forfeiture* for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence . . ." (Title 49 U.S.C. §43, originally enacted Feb. 19, 1903, and Title 42 U.S.C. §405(f), §46, Feb. 11, 1893);

"No such witness shall be prosecuted or subjected to any penalty or *forfeiture* for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence . . ." (Title 18 U.S.C. §2514, July, 1968); also see Title 18, U.S.C. §3486(a), August 20, 1945; also see Title 18 U.S.C. §1406, July 18, 1956; "But no natural person shall be prosecuted or subjected to any penalty or *forfeiture* . . ." (Title 46, U.S.C. §827, originally enacted September 7, 1916); see also Title 15, U.S.C. §49, Sept. 26, 1914.

Thus it is seen that historically our law-makers recognized that the privilege is intimately involved in forfeitures.

The next aspect of the government's argument is an insistence that forfeiture remedies a violation of federal law and that one of the main reasons for the forfeiture laws is to seize and destroy property used in the violation of the tax laws relating to the manufacture of liquor, tobacco, firearms, and contraband, and thus remove such property from circulation. The government even suggests that such destruction would have effectuated the prohibition laws. We trust the suggestion was not made regretfully. But we are here dealing with money. Certainly the money is not to be seized and destroyed. The government seems overly interested in stamping out gambling, rather than the collection of taxes. It seems to forget that gambling is not made illegal under federal law. It is the State's responsibility to control gambling. It is rather the government's obligation to stimulate revenue in a manner consistent with the rights of the individual. Destruction of the property here (which we know the government has no intention of doing) implements no valid tax law.

The government contends that the forfeiture statutes operate merely to correct a tax violation (p. 17). Here the violation to be "remedied" is payment of a $50.00 occupational tax. But none of the $8,674.00 has been applied to satisfaction of that tax. The government itself assessed the claimant for that tax, and it has, under protest, been paid. The government's action is wholly at odds with its argument.

b. The intent of the possessor is essential to the forfeiture of property not contraband per se.

Contrary to the government's argument it is not the property itself that is the offender (See p. 13), it is the intent of the possessor that offends.

The government has argued with some redundance that property may be forfeited notwithstanding the lack of criminality in the owner-claimant and without regard to the *conviction* of the offender. However, the government's argument carefully skirts the intent of the possessor. It is well established that the intent of the possessor is the decisive factor in determining whether the property was intended for use in violating the provisions of the Internal Revenue Laws. The wording of the statute (Title 26, U.S.C., Section 7302) clearly makes the intent of the possessor necessary to forfeiture.

> "It shall be unlawful to have or possess any property *intended* for use in violating the provisions of the Internal Revenue Laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property . . . " (Emphasis ours)

Thus the Seventh Circuit, out of which this case arose, so held in its analysis of the predecessor to Section 7302:

> "A reading of Sec. 3116, as well as the cases where it has been applied, indicates that the material factor

is the intention of the possessor of property, in the instant case the truck." *United States* v. *One 1942 G. M. C. Tractor Truck*, 7 Cir. 182 F.2d 278, 282.

"Intent" of the possessor is again emphasized by the Eighth Circuit decision in *United States* v. *Windle*, 158 F. 2d 196, where it makes it clear that the predecessor to this section "authorizes forfeiture on proof merely of intent to commit a crime and although commission of that crime is not required to be proved, perhaps the most probative evidence of that intent lies in proof of actual commission of the offense." (158 F.2d at 199)

In *United States* v. *2265 One-Gallon Parafin Tin Cans*, 260 F. 2d 105, the Fifth Circuit emphasized the necessity of proof of illegal intention of the possessor. (260 F. 2d 107)

The emphasis in the government's brief of the possibility of an innocent intent by an owner-claimant, to the utter disregard of the intent of the possessor, presents a false issue, for illegal intent by the possessor was necessary to proof validating the forfeiture.

The government's argument is wholly at odds with the clear wording of the Statute. "It shall be unlawful to have or possess . . ." (26 U.S.C. §7302). To satisfy the wording there must be a haver, there must be a possessor.

It would seem that this court in *One 1958 Plymouth Sedan* v. *Commonwealth of Pennsylvania*, 380 U.S. 693 made clear the distinction between per se contraband and the forfeiture of property, such as the money here involved. It discussed with clarity forfeitures concerning objects, the possession of which, without more, constitutes a crime, and the repossession of which would constitute another crime. Like the Plymouth, there is nothing remotely criminal in possessing money. It is only the use to

which the money was put or was intended to be put that subjects the claimant to its possible loss. Since this is property not intrinsically illegal in character, it becomes "derivative contraband" only from the acts of the possessor. The return of the money to the owner-claimant would not subject him to any possible criminal penalties for possession or frustrate any public policy concerning money, as money. It is only his act or omission that makes the money subject to forfeiture, and it is inconceivable that property would become 'derivative contraband' on proof that the use that gave it its contraband nature was the exercise of a constitutional right." (See 380 U.S. at 699)

c. Illegal intent cannot be found in an omission to waive constitutional rights.

This court did not overlook the power of the Congress to tax, nor the necessities of government to raise revenue. It said it just couldn't be done in this way.

> "We cannot know how Congress would assess the competing demands of the federal treasury and of state gambling prohibitions; we are, however, entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values." *Marchetti* v. *United States*, 390 U.S. 39, 59-60.

Those values are in no wise minimized by the form of sanction, where the act required to avoid sanction is repugnant to the constitution.

> Here, as in *Marchetti*, the statutory obligations are directed almost exclusively to individuals inherently suspect of criminal activities. The principal interest of the United States must be assumed to be the collection of revenue, and not the prosecution of gamblers, United States v. Calamaro, 354 U.S. 351, 358, 77 S. Ct. 1138, 1143, 1 L.Ed. 2d 1394; but we cannot ignore either

> the characteristics of the activities about which information is sought, or the composition of the group to which the inquiries are made. These collateral circumstances, in combination with Congress' apparent wish that any information obtained as a consequence of the wagering taxes be made available to prosecuting authorities, readily suffice to distinguish these requirements from those at issue in *Shapiro. Grosso* v. *United States,* 390 U.S. 62, 68.

The government argues:

> "One engaged in wagering without complying with the federal tax laws runs the risk that he may forfeit the property which has been used in connection therewith." (Page 27, Its Brief)

As has been brought out forcibly by this court's decisions in *Marchetti* and *Grosso* compliance with the federal tax laws here involved, 4411 and 4412, is clearly incriminatory. The governments statement, therefore, that forfeiture may ensue from a refusal to comply is at direct odds with this Court's decision and clear language in *Garrity* v. *State of New Jersey* as follows:

> "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent.
>
> • • •
>
> "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price." *Garrity* v. *State of New Jersey,* 385 U.S. 493, 497, 500.

As this court said in *Griffin* v. *State of California,* 380 U.S. 609, this constitutes the imposition of a sanction which makes assertion of the Fifth Amendment privilege

"costly". (380 U.S. at 614) And most particularly in this Court's decision in *Spevack* v. *Klein*, 385 U.S. 511:

> "We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others." (385 U.S. 511, 516)

Neither are gamblers excepted from the words "no person . . . shall be compelled in a criminal case to be a witness against himself," and gamblers too, like lawyers, enjoy first class citizenship. See *Spevack* v. *Klein*, *Supra*.

The tortured interpretation given *Boyd* by the government—to equalize it with the common law concept of forfeiture—must be discarded. The government takes some comfort out of the fact that the provision for forfeiture was included in the sanctions for the crime, that is, that certain acts of fraud committed against the public revenue in relation to imported merchandise made the offender subject to a fine not exceeding $5,000.00 and imprisonment up to two years, "and in addition to such fines, such merchandise shall be forfeited." The language in 28 U.S.C. 7302 says:

> "It shall be unlawful to have or possess any property . . ."

The placement of the sanction does not make it less efficacious, nor divorce it from the provisions upon which it depends. As a matter of fact, general penalties statutes or provisions are overwhelmingly common, too common for the government to effect a false distinction.

Further, the distinction the government attempts to make on the basis that *Boyd* and *Plymouth* had "Fourth Amendment implications" as opposed to Fifth Amendment "implications" is fatuous. Boyd made clear that the

Fourth and Fifth Amendment are so interconnected that the protection of the Fourth, the compulsion to produce books and papers is, in fact, compulsory self-incrimination. *Boyd* said this clearly at pages 634-5:

> "a compulsory production of the products, books, and papers of the owner of goods sought to be forfeited in . . . a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment."

Boyd based its exclusion of unlawfully seized evidence squarely on the specific prohibition of the Fourth and Fifth Amendments. And as this court said in *Mapp* v. *Ohio*, 367 U.S. 643 at 646:

> "the Fourth and Fifth Amendments run almost into each other."

And again in *Mapp*, this court said that the use of illegally seized evidence is "tantamount to coerced testimony." (367 U.S. at 656)

The only intent of the possessor here was an intent not to waive rights and privileges secured under the provisions of the Fifth Amendment to the Constitution of the United States. His election was to refuse to prove his own guilt to avoid admitting it. *United States* v. *Kahriger*, 345 U.S. 22, 34. Illegal intent cannot be found in a refusal or omission to waive constitutional safeguards.

> ". . . if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it. Such references bottomed on what must ordinarily be a fiction, have precisely

the infirmities which the Court has found in other circumstances in which implied or uninformed waivers of the privilege have been said to have occurred. See e.g., Carnley v. Cochran, 369 U.S. 506, 82 S. Ct. 884, 8 L.Ed.2d 70. Compare Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; and Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680. To give credence to such 'waivers' without the most deliberate examination of the circumstances surrounding them would ultimately license widespread erosion of the privilege through 'ingeniously drawn legislation.' Morgan, The Privilege against Self-Incrimination, 34 Minn.L.Rev. 1, 37. We cannot agree that the constitutional privilege is meaningfully waived merely because those 'inherently suspect of criminal activities' have been commanded either to cease wagering or to provide information incriminating to themselves and have ultimately elected to do neither.'' *Marchetti v. United States*, 390 U.S. 39, 51-52)

2. ***This judgment can be reversed only in violation of the law as recognized in Marchetti-Grosso. Strict prospective application of the law—in contravention of the basic rule giving retrospective application to this Court's decisions—will only be indulged in the presence of overwhelming countervailing considerations. They do not exist here.***

The government urges this Court to declare that the *Marchetti-Grosso* rationale be applied to forfeitures only to cases tried after this court's ruling in those cases.[1] It urges in support of its position that recent cases of this court have limited newly adopted criminal rules, which do not bear on the integrity of the guilt-determining process, to prospective application.

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[1] It seems fairly obvious there will be none.

What the United States overlooks in evaluating those cases is that they are exceptions to the rule of complete or limited retroactivity, and prospective application resulted only because of overwhelming contravailing considerations. The first case relied on, *Linkletter* v. *Walker*, 381 U.S. 618, made that eminently clear. It cited Mr. Justice Holmes dissent in *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349, disclaiming knowledge of any authority for making law only for the future, and emphasizing that judicial decisions have had retrospective application "for near a thousand years." (fn. 6, 381 U.S. at 622). The case emphasized the distinction between new law and true law, and true law is the essence of *Marchetti-Grosso*. It is old law that a man may not be compelled to incriminate himself; it is old law that he cannot be punished for refusing self-incrimination. But it also recognized that when a case wrongly decided (here *Kahriger-Lewis*) is overruled, intermediate cases "finally decided" are not to be disturbed. But this case is not finally decided. The moneys here have not been definitely condemned (381 U.S. at 625-626), and should be restored.

After a complete review of the history regarding the question, this Court concluded:

> "Under our cases it appears (1) that a change in law will be given effect while a case is on direct review, Schooner Peggy, supra, and (2) that the effect of the subsequent ruling of invalidity on prior final judgments when collaterally attacked is subject to no set 'principle of absolute retroactive invalidity' but depends upon a consideration of 'particular relations * * * and particular conduct * * * of rights claimed to have become vested, of status, of prior determinations deemed to have finality'; and 'of public policy in the light of the nature both of the statute and of its previous application.' Chicot County Drainage

Dist. v. Baxter State Bank, supra, 308 U.S., at 374, 60 S.Ct. at 319." *Linkletter* v. *Walker*, 381 U.S. 618, 627.

It would seem that (1) above would conclude the Government's argument as to this case, and (2) is, at least, purely anticipatory.

Recently the United States Court of Appeals for the Second Circuit, sitting en banc, recognized retroactivity as the basic rule, when faced with the recently recurring urgings of the United States for prospective application only, but it continued in analysis of the cases urged there as they are here, as standing to justify prospective application:

"In *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 409 n. 3 (1966), the Court similarly treated the rule announced in *Griffin* v. *California*, 380 U.S. 609 (1965), which forbade adverse comment by prosecutors and judges on the failure of a defendant to testify in a state criminal trial. However, relying on the later-decided opinion in *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), and *Stovall* v. *Denno*, 388 U.S. 293 (1967), the Government counters that the Supreme Court did not realize what it was doing in the earlier decisions discussed above. The Government claims that 'if the Court had ever considered the question squarely' in those earlier decisions, it would have ruled the other way. However, a careful consideration of even the cases relied on by the Government and of the underlying considerations leads us to reaffirm *Sheller*.

In *Stovall* v. *Denno*, *supra*, the Supreme Court considered the retroactivity of the rules announced in *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), which required 'the exclusion of identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of his counsel.' 388

U.S. at 294. The Court pointed out, *id.* at 296-97, that the *Linkletter, Tehan,* and *Johnson* cases

> 'establish the principle that in criminal litigation concerning constitutional claims, "the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application' . . . ." [Citation omitted.] The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.'

"Applying these criteria in *Stovall,* the Court held that the new rules were prospective only and refused to distinguish between 'convictions now final . . . and convictions at various stages of trial and direct review.' It regarded 'the factors of reliance and burden on the administration of justice as entitled to such overriding significance as to make that distinction unsupportable.' *Id.* at 300-01. The analysis in *Johnson* v. *New Jersey,* 384 U.S. 719, 726-33 (1966), also relied on by the Government, was similar.

"On the other hand, applying this reasoning to the question in this case, leads to a completely opposite result." *United States* v. *Tarrazo,* 2 Cir., 398 F.2d 621, 623-4.

Extending the *Marchetti-Grosso* rule to forfeiture cases still on appeal when it was announced will place no significant "burden on the administration of justice." In *Stovall* and *Johnson,* the court was obviously concerned that great numbers of cases might be reopened even by limited retroactivity.

The government has made *one* argument in favor of prospective applicability, that is: they have recovered $6.5 million dollars worth of property of which *not even*

a major portion would be subject to return if retroactive application were determined, but nonetheless, it fears the "potentialities" of fruitless litigation. It is unbelievable that private practitioners are not more aware of the futility of senseless litigation than our governmental counterparts, who are on retainer to one client, whatever the case.

There can be no doubt that the government seeks to impress this court by the amounts of money involved—not in this case—but in others. As they felt "it should be noted" that well in excess of $300,000 is involved in *United States* v. *One 1965 Buick*, 6 Cir., 392 F. 2d 672, pending on petition for Writ of Certiorari, No. 619 of this Court, and see also the chart on p. 33, plus the $6 million figure (p. 32).[2] The mere $8600 involved here is embarrassingly insignificant by comparison. Fortunately the Constitutional question is not, and in the light of that question, the term "title to property validly acquired" (pp. 8, 35, its brief) is prepossessing, when used by the government. We have here a Constitutional conflict and none can say a thing was done validly which conflicts with the Constitution. It is, for example, somewhat disquieting that the government should argue "that, at most, *only* a due process question—relating to the deprivation of property is involved." (p. 24, its brief, our emphasis). There is thus raised another substantial Fifth Amendment question.

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[2] We are in no position to comment on the $6.5 million figures (pp. 8, 32, 33, its brief). Their validity is certainly no part of this record. Statistics—and it is admitted these are not reliable statistics (p. 33, its brief)—are more properly presented to the Congress for proper legislation. The preoccupation with large sums constituting forfeitures under these Acts can only have the intent that this Court subserve to indulge expediency, which we are confident will not be done.

Insofar as the government argument is premised on governmental reliance on the doctrine of *Kahriger-Lewis*, we submit this is false. In the absence of *Kahriger-Lewis*, the forfeiture actions would still proceed in reliance on the statutes (26 U.S.C. §4411 and §4412), as they did before those cases. But, even assuming such reliance, that does not raise the countervailing circumstances envisioned by the cases on which the government relies.

No further hearings will have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated, compare *Linkletter* v. *Walker*, 381 U.S. at 637. There is no problem here of "a legalized mass of jail break by rapists, murderers, and other felons." See *Schwartz*, retroactivity reliability and due process: a reply to Professor Mishkin, 33 U.Chi. L.Rev. 719, note 4, page 745.

No argument of reliance by "law enforcement authorities" can validly be made. The respondent monies seized here, were seized as an incident to Mr. Angelini's arrest, for violation of Section 7203 in that he did wilfully fail to comply with Sections 4411 and 4412 of Title 26. Nothing was done in reliance upon former decisions on the search incident to arrest, searches incident to arrest are not affected by this decision. No law affecting the right to search incident to arrest has been changed.

No one is going to give back the sentence Mr. Angelini served, or compensate for it. This notwithstanding his asserted Fifth Amendment defense, rejected on review and later vindicated in Marchetti and Grosso.

In sum, the government says, "our agents forfeited the money in good faith—let us keep it, because your prior decisions led us to believe we were entitled to it. In that way, even though we lose, we win." The argument is valid only if a balm is customary, for that is what this would be.

The government also urges that retroactive application, complete or limited, could or might result in a plethora of suits, destined to failure (pp. 8, 34, Its Brief). We do encounter aimless litigation, doomed to failure, from time to time. But not often. Such isolated instances will probably always be with us. But the threat of a deluge of such suits in the absence of declaring prospective litigation, is unrealistic. Law offices are not kept open on ill-fated law suits.

Further, it is not this Court's habit to anticipate burdens on the administration of justice—even when they are practical, rather than fanciful as here. This Court settles problems and questions in the administration of justice only when they *exist* and only when they become troublesome. *Linkletter* v. *Walker*, 381 U.S. 618, 620.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully submitted that the decision of the United States Court of Appeals for the Seventh Circuit be affirmed.

Respectfully submitted,

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